

“NEPA Task Force Comments”

January 30, 2006

Families For Outdoor Recreation

P.O. Box 20275
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NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building

Dear Congressional Representatives and NEPA Task Force Staff,

Families For Outdoor Recreation (FFOR) represents thousands of families and groups across Montana, Northern Wyoming, the Dakotas and Southern Idaho. For decades generations of families have accessed our United States Forest Service (USFS) public lands to recreate, hunt, attain their livelihoods, and utilize public lands under the “sustained multiple-use” designations these public lands were set aside for. We are very supportive and want to express our appreciation for your time, attention, and interest in holding this special investigation with public hearings to understand how NEPA is working and being used today compared to how it was intended. We hope this NEPA Task Force is able to make rational changes to NEPA to return the law to the original intent and put an end to the misuse we have seen over the years. We have reviewed your report issued December 21, 2005 and through this correspondence intend to add comments to the recommendations the Task Force has brought forward. For the sake of clarity we have chosen to recite the NEPA Task Force recommendations then follow each recommendation with our comments about the recommendation.

Group 1 - Addressing Delays in the process

Recommendation 1.1: Amend NEPA to define “major federal action.”

NEPA would be enhanced to create a new definition of “major federal action” that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures.

FFOR Comment to Recommendation 1.1 – A firm definition of “major federal action” is desperately needed. We believe a set of defining criteria can be assembled to define a “go / no-go” gauge for when NEPA must be applied. Unfortunately, without this definition at the outset NEPA has been migrated to be a tool used to abusively delay public land managers in the process of managing public lands. Furthermore, without this definition judges have been put into a position of making management decisions instead of interpreting law and definition when suits involving public land management and NEPA are brought before them. Unfortunately, this “defining from the bench” has set precedent for some decisions about public land which are inconsistent, impractical, and often not reasonable.

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Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents.

A provision would be added to NEPA that would limit to 18 months the time for completing an Environmental Impact Statement (EIS). The time to complete an EA will be capped at 9 months. Analyses not concluded by these timeframes will be considered completed. There will obviously be situations where the timeframes cannot be met, but those should be the exception and not the rule. Before the time expires, an agency would have to receive a written determination from CEQ that the timeframes will not be met. In this determination, CEQ may extend the time to complete the documents, but not longer than 6 and 3 months respectively.

FFOR Comment to Recommendation 1.2 – There must be a timeline for completing the EIS, after all there is a timeline set for completing public comment. A legitimate need for extending the timeline would be to complete data collection.

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CE), Environmental Assessments (EA) and Environmental Impact Statements (EIS).

In order to encourage the appropriate use of CEs and EAs the statute would be amended to provide a clear differentiation between the requirements for EA's and EIS's. For example, in order to promote the use of the correct process, NEPA will be amended to state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a CE unless the agency has compelling evidence to utilize another process.

FFOR Comment to Recommendation 1.3 – This is needed along with the definition of a “major federal action”. Accomplishing this clarification of NEPA would go a long way to help prevent a judge from stating a CE requires the full NEPA work-up, such as what happened earlier this year when Native Ecosystems confronted the USFS about the use of CE's for routine, non-impact public use of public lands. This would further reduce the misuse of NEPA as a tool to accomplish political goals by radical environmental groups.

Recommendation 1.4: Amend NEPA to address supplemental NEPA documents.

A provision would be added to NEPA to codify criteria for the use of supplemental NEPA documentation. This provision would limit the supplemental documentation unless there is a showing that: 1) an agency has made substantial changes in the proposed actions that are relevant to environmental concerns; and 2) there are significant new circumstances or information relevant to environmental concerns and 26 bearing on the proposed action or its impacts. This language is taken from 40 CFR 1502.9(c)(1)(i) and (ii).

FFOR Comment to Recommendation 1.4 – The NEPA documents issued are overwhelmingly long, drawn-out, redundant, and opinionated. There is seldom a basis for providing MORE documentation. Rather there is a need for better quality documentation which gets to the point, states indisputable facts and leaves the opinions out.

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Group 2 - Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments.

When evaluating the environmental impacts of a particular major federal action, the issues and concerns raised by local interests should be weighted more than comments from outside groups and individuals who are not directly affected by that proposal.

FFOR Comment to Recommendation 2.1 – This is another important recommendation. The local people affected by an action are the ones that must have the say about the action, not the people hundreds or thousands of miles away that submit a form letter on a globally-based, politically biased, environmental groups’ web page. Those from outside the local area (state or county) that is impacted by the federal action should have little or no weight placed on their input to the decision. Furthermore, environmental groups are given almost authoritative input into federal decisions. Several of these environmental groups are given local names but in reality are simply spin-offs from large well funded national and international power-house groups with political goals. These environmental groups if not locally based and funded are not local citizen action groups and therefore must be ignored.

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in 40 CFR 1502.7.

A provision would be added to NEPA to codify the concept that an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects.

FFOR Comment to Recommendation 2.2 – The NEPA documents related to the Region 1 Forest Service Travel Plans averaged over 1000 pages and were full of inaccurate and improperly constructed maps. Over a period of months several travel plans were issued for public review and comment. It is impossible for the public to participate adequately in a process that produces thousands of pages of documentation, with maps that are not accurate and are not properly constructed. The Region 1 Travel Planning Process is a study in how NOT to use NEPA. It has been full of misapplication, misuse, and public abuse under the front of NEPA. The process was non-collaborative, the FS has their mind made up on what they want to do and NEPA is a hoop they are jumping through in the path to implement their plans.

Group 3 – Better Involvement for State, Local and Tribal Stakeholders

Recommendation 3.1: Amend NEPA to grant tribal, state and local stakeholders cooperating agency status.

NEPA would be enhanced to require that any tribal, state, local, or other political subdivision that requests cooperating agency status will have that request granted, barring clear and convincing evidence that the request should be denied. Such status would neither enlarge nor diminish the decision making authority for either federal or non-federal entities. The definition would include the term “political subdivisions” to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA.

FFOR Comment to Recommendation 3.1 – The definition of “political subdivisions” with examples is needed.

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements.

CEQ would be directed to prepare regulations that would, in cases where state environmental reviews are functionally equivalent to NEPA requirements, allow these requirements to satisfy commensurate NEPA requirements.

FFOR Comment to Recommendation 3.2 – The reduction of redundancy and moving the review to a state level is beneficial.

Group 4 - Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision.

In order to address the multitude of issues associated NEPA litigation in an orderly manner the statute would be amended to create a citizen suit provision. This provision would clarify the standards and procedures for judicial review of NEPA actions. If implemented, the citizen suit provision would:

- Require appellants to demonstrate that the evaluation was not conducted using the best available information and science.
- Clarify that parties must be involved throughout the process in order to have standing in an appeal.
- Prohibit a federal agency – or the Department of Justice acting on its behalf – to enter into lawsuit settlement agreements that forbid or severely limit 27 activities for businesses that were not part of the initial lawsuit. Additionally, any lawsuit settlement discussions involving NEPA review between a plaintiff and defendant federal agency should include the business and individuals that are affected by the settlement is sustained.
- Establish clear guidelines on who has standing to challenge an agency decision. These guidelines should take into account factors such as the challenger’s relationship to the proposed federal action, the extent to which the challenger is directly impacted by the action, and whether the challenger was engaged in the NEPA process prior to filing the challenge;
- Establish a reasonable time period for filing the challenge. Challenges should be allowed to be filed within 180 days of notice of a final decision on the federal action;

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FFOR Comment to Recommendation 4.1 – Shorten the timeline for Challenges to 90 days. Provide provisions that place accountability onto the challenger such that if they challenge the legality of a federal decision on a NEPA basis and the judge does not find fault with the process then the challenger is liable for damages, economic loss, legal fees and court costs.

Recommendation 4.2: Amend NEPA to add a requirement that agencies “pre clear” projects.

CEQ would become a clearinghouse for monitoring court decisions that affect procedural aspects of preparing NEPA documents. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ should be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability.

FFOR Comment to Recommendation 4.2 – This is good, it would centralize and prevent federal agency offices from taking actions which would set precedence or create consequences for other agencies.

Group 5- Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are economically and technically feasible.

A provision would be created to state that alternatives would not have to be considered unless it was supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community).

FFOR Comment to Recommendation 5.1 – The danger of this recommendation is that if the federal agency doesn’t want a particular outcome then they simply dumb down the alternative to make it not technically feasible. How do you conclude whether or not an alternative is feasible if you don’t complete some level of data collection and analysis? It appears that this may become a shortcut that could be misused to eliminate alternatives when the federal agency is trying to achieve a planned outcome.

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must include consideration of the environmental impact of not taking an action on any proposed project.

A provision would be created that require an extensive discussion of the “no action alternative” as opposed the current directive in 40 CFR 1502.14 which suggests this alternative merely be included in the list of alternatives. An agency would be required to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision.

FFOR Comment to Recommendation 5.2 – The “no action” alternative does not get a fair evaluation today in many federal decisions.

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory.

CEQ would be directed to craft regulations that require agencies to include with any mitigation proposal a binding commitment to proceed with the mitigation. This guarantee would not be required if (1) the

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mitigation is made an integral part of the proposed action, (2) it is described in sufficient detail to permit reasonable assessment of future effectiveness, and (3) the agency formally commits to its implementation in the Record of Decision, and has dedicated sufficient resources to implement the mitigation. Where a private applicant is involved, the 28 mitigation requirement should be made a legally enforceable condition of the license or permit.

FFOR Comment to Recommendation 5.3 – Mitigation is more cost effective than litigation...

Group 6 – Better Federal Agency Coordination

Recommendation 6.1: Direct CEQ to promulgate regulations to encourage more consultation with stakeholders.

As pointed out in testimony, the existence of a constructive dialogue among the stakeholders in the NEPA process and ensuring the validity of data or to acquire new information is crucial to an improved NEPA process. To that end, CEQ will draft regulations that require agencies to periodically consult in a formal sense with interested parties throughout the NEPA process.

FFOR Comment to Recommendation 6.1 – The “stakeholders” and “interested parties” cannot be power house environmental groups or the “citizen action groups” tied to them with high-paid lawyers or full time staff. The “stake holders” and “interested parties” must be the public or the citizen action groups truly representing the public.

Recommendation 6.2: Amend NEPA to codify CEQ regulation 1501.5 regarding lead agencies.

In regulation, the lead agency is given certain authorities. Legislation such as SAFE TEA-LU and the Energy Policy Act of 2005 have spoken to the need for lead agencies in specific instances such as transportation construction or natural gas pipelines. In order to reap the maximum benefit of lead agencies, their authorities should be applied “horizontally” to cover all cases. To accomplish this, appropriate elements of 40 CFR 1501.5 would be codified in statute. Additional concepts would be added such as charging the lead agency with the responsibility to develop a consolidated record for the NEPA reviews, EIS development, and other NEPA decisions. This codification would have to ensure consistency with lead agency provisions in other laws.

FFOR Comment to Recommendation 6.2 – No comment

Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality.

This recommendation would direct the Council on Environmental Quality to create a NEPA Ombudsman with decision making authority to resolve conflicts within the NEPA process. The purpose of this position would be to provide offset the pressures put on agencies by stakeholders and allow the agency to focus on consideration of environment impacts of the proposed action.

FFOR Comment to Recommendation 7.1 – This is good if the Ombudsman is not politically biased and somehow accountable for the decisions.

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Recommendation 7.2: Direct CEQ to control NEPA related costs.

In this provision CEQ would be charged with the obligation of assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies.

FFOR Comment to Recommendation 7.2 – This would add some stewardship to the growth of the NEPA Process.

Group 8 - Clarify meaning of “cumulative impacts”

Recommendation 8.1: Amend NEPA to clarify how agencies would evaluate the effect of past actions for assessing cumulative impacts.

A provision would be added to NEPA that would establish that an agency’s assessment of existing environmental conditions will serve as the methodology to account for past actions.

FFOR Comment to Recommendation 8.1 – The cumulative impacts must be considered must also include the socioeconomic impacts as well. Cumulative impacts on recreation and local economies, natural resource sustainability, and wildlife impact on man must also be assessed. These cumulative impacts are not currently evaluated and assessed adequately.

Recommendation 8.2: Direct CEQ to promulgate regulations to make clear which types of future actions are appropriate for consideration under the cumulative impact analysis.

CEQ would be instructed to prepare regulations that would modify the 29 existing language in 40 CFR 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are “reasonably foreseeable.”

FFOR Comment to Recommendation 8.2 – No comment

Group 9 - Studies

Recommendation 9.1: CEQ study of NEPA’s interaction with other Federal environmental laws.

Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that:

- a. Evaluates how and whether NEPA and the body of environmental laws passed since its enactment interacts; and
- b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

FFOR Comment to Recommendation 9.1 – Yes

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Recommendation 9.2: CEQ Study of current Federal agency NEPA staffing issues.

Within 1 year of the publication of The Task Force final recommendations, the CEQ (with necessary assistance and support from the Office of Management and Budget) will be directed to conduct a study and report to the House Committee on Resources that details the amount and experience of NEPA staff at key Federal agencies. The study will also recommend measures necessary to recruit and retain experienced staff.

FFOR Comment to Recommendation 9.2 – Simplifying NEPA, improving definitions, and otherwise implementing these recommendations will improve the process and reduce the cost of managing NEPA.

Recommendation 9.3: CEQ study of NEPA’s interaction with state “mini-NEPAs” and similar laws.

Within 1 year of the publication of The Task Force final recommendations, the CEQ will be directed to conduct a study and report to the House Committee on Resources that at a minimum:

- a. Evaluates how and whether NEPA and the body of state mini-NEPAs and similar environmental laws passed since NEPA’s enactment interacts; and
- b. Determines the amount of duplication and overlap in the environmental evaluation process, and if so, how to eliminate or minimize this duplication

FFOR Comment to Recommendation 9.3 – No comment

This concludes the comments of FFOR. We would like to reiterate our sincere appreciation for you taking on the challenge to review, validate, and update NEPA to meet the needs present today.

Best Regards,

Ed Melcher
Chairman
Families For Outdoor Recreation